

No. 19-123

IN THE
Supreme Court of the United States

SHARONELL FULTON, ET AL.,
Petitioners,

v.

CITY OF PHILADELPHIA, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**BRIEF OF *AMICI CURIAE*
ORGANIZATIONS SERVING LGBTQ YOUTH
IN SUPPORT OF RESPONDENTS**

JENNIFER C. PIZER
Counsel of Record
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
4221 Wilshire Blvd.,
Suite 280
Los Angeles, CA 90010
(213) 590-5903
jpizer@lambdalegal.org

M. CURREY COOK
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
120 Wall St.,
19th Floor
New York, NY 10005
(212) 809-8585
ccook@lambdalegal.org

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*¹

Amici are non-profit organizations serving lesbian, gay, bisexual, transgender, and queer/questioning (“LGBTQ”)² youth, whether through direct support services, health and wellness services, medical care, legal representation, crisis intervention and suicide prevention services, homelessness prevention, or grassroots and policy advocacy. They work directly with, for, and on behalf of LGBTQ youth, including youth in the foster care system nationwide, from rural to urban settings. *Amici* are not government-funded contract foster care child placing, case management, or foster care licensing and recruitment agencies, but play a supportive role for LGBTQ youth in their communities, often learning firsthand the ways in which many of these youth have not had their needs met by government and contract child welfare agencies. In particular, *Amici* have seen the harmful impacts of stigma and discrimination on these youth, both as factors resulting in their disproportionate representation in the child welfare system and their often poor treatment, including a lack of supportive

¹ As required by Rule 37 of this Court, *Amici* obtained consent of counsel of record for all parties to file this brief. Respondents filed with the Court a letter providing blanket consent. Petitioners and Intervenors provided written consent. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici’s* counsel made a monetary contribution intended to fund the brief’s preparation or submission.

² LGBTQ is used throughout this brief for brevity and consistency, however, some *Amici* use variations of this acronym to recognize the diverse terms children and youth use to identify themselves, such as pansexual, asexual, genderqueer, two-spirit, and nonbinary, and to include intersex youth.

foster homes, while in it. This harm negatively impacts their housing stability, leading to homelessness and risk of trafficking; their physical and mental health; and their life outcomes when exiting government care. As the Court considers the implications of Petitioners' request to require the City of Philadelphia ("the City" or "Philadelphia") to permit government-contracted foster care agencies to discriminate against same-sex couples in the public child welfare system via a religion-based exemption from generally applicable nondiscrimination requirements, *Amici* offer their informed perspectives on the harm posed to the hundreds of thousands of LGBTQ youth in government care nationwide, including thousands in Philadelphia.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of LGBTQ people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal's Youth in Out-of-Home Care Project works to affirm and uphold the rights of LGBTQ youth and youth living with HIV in child welfare and juvenile justice systems and experiencing homelessness.

Bradbury-Sullivan LGBT Community Center hosts an out-of-school-time youth program in Allentown, Pennsylvania serving LGBT youth ages 14-21, including many who are homeless or housing insecure. Bradbury-Sullivan Center provides essential programs and services that are not offered elsewhere in our community. The Allentown School District is a 100% free-and-reduced lunch district and

many youth served by Bradbury-Sullivan live with serious economic hardship.

CenterLink develops strong, sustainable LGBT community centers and builds a thriving network that creates healthy, vibrant communities. It helps centers improve their organizational and service delivery capacity, access public resources, and engage their communities in the grassroots social justice movement. For thousands of LGBT youth, local LGBT centers provide a safe environment to explore their identities, and CenterLink assists with that programming.

Hudson Pride Center is a community-based organization situated in Jersey City, home to the largest LGBTQ community in New Jersey. Programs include social/educational groups, linkage to HIV care and prevention services, assistance for gender marker changes, affirming health care, and a safe space for LGBTQ youth.

Inside Out Youth Services in Colorado Springs, Colorado advocates and educates for and alongside LGBTQ youth ages 13-24 including youth in the child welfare system and their families. It addresses health disparities among LGBTQ youth caused by discrimination, including increased risks for substance use, suicide, sexual violence, and assault. It also supports foster youth who often experience harm caused by multiple placements with families that do not accept and support them.

The Lambert House LGBTQ Youth Center in Seattle, Washington delivers 48 programs and services for LGBTQ youth in nine locations in Washington State and online.

The Lesbian, Gay, Bisexual & Transgender Community Center (“The Center”) of New York City empowers people to lead healthy, successful lives. The Center celebrates our community’s diversity and advocates for justice and opportunity where everyone is celebrated for who they are. Through its family and youth programming, The Center provides services that thousands of families need and that allow LGBTQ young people to flourish.

Louisville Youth Group Inc. (“LYG”) is the primary LGBTQ youth organization serving Kentucky and Southern Indiana. YG creates a brave space for LGBTQ youth and allies that promotes personal and community growth through relationship building, leadership development, and social justice activism. YG provides youth with skills to help them thrive as leaders. It writes a counter-narrative to rejection and isolation.

The LGBTQ Center of Southern Nevada is a community-based organization with activities to support the well-being, positive image, and human rights of the LGBTQ community. Through its work with youth, families, and seniors, The Center witnesses the damage done when members of the LGBTQ community are ostracized from their families because of their gender identity or sexual orientation. Its Pivot program brings positive outcomes for families struggling with the coming out process and youth in foster care, and its Qvolution program provides support and a safe space for LGBTQ youth.

Mazzoni Center in Philadelphia provides comprehensive health and wellness services in an LGBTQ-focused environment while preserving the dignity and improving the quality of life of those it

serves. Mazzoni Center prioritizes especially vulnerable members of the LGBTQ and HIV-positive community, including youth, people of color, and low-income individuals.

The Montrose Center is the LGBTQ community center in Houston, Texas. Its Hatch Youth program empowers LGBTQ youth, providing behavioral health, rapid rehousing, and foster parent recruitment.

Arizona's One-N-Ten envisions a world where all LGBTQ youth and young adults are embraced for who they are, actively engaged in their communities, and empowered to lead. One-N-Ten's mission is to serve LGBTQ youth and young adults ages 11-24 and enhance their lives with programs that promote self-expression, self-acceptance, leadership development, and healthy life choices.

Out Boulder County in Colorado educates, advocates, and provides services, programs, and support for Boulder County's LGBTQ communities. It aims to serve as a model of equality, respect, and well-being for LGBTQ people, including both LGBTQ youth and children of LGBTQ parents, having observed directly how LGBTQ-parent-headed families are some of the most loving, safe, and capable in our community.

Pacific Pride Foundation ("PPF") provides services and programs to the LGBTQ community of California's Central Coast. Its programs for youth and older adults, counseling services, LGBTQ competency training, and community events all focus on creating a thriving and visible LGBTQ community.

Pennsylvania Youth Congress Foundation (“PYC”) is a statewide LGBTQ youth advocacy organization. It supports affirming communities for young LGBTQ Pennsylvanians through collaborative partnerships and advocacy for policies that protect LGBTQ youth and families from discrimination. PYC supports youth and parents involved in the foster care system and maintains connections with former foster youth.

Oregon’s Q Center provides safe space, resources, and advocacy to support LGBTQ resilience, including specialized support for youth, veterans, and seniors across the state. Programs include support around sexual orientation, gender identity, addiction, and mental health, and relationship building.

Resource Center in North Texas is one of the largest LGBTQ community centers in the country and the primary LGBTQ and HIV/AIDS service organization in its region. Among its many services is its Youth First program, which offers support groups, social programming, and community building activities for LGBTQ and allied youth ages 12-18.

Ruth Ellis Center (“REC”) is a nonprofit in Highland Park, Michigan, that creates opportunities with LGBTQ young people of color to build a positive future. Most young people served have experienced homelessness, out-of-home care, poverty, intersectional oppression, and other barriers to wellbeing. REC’s services include street outreach and drop-in services, housing case management, primary and behavioral health care, home-based family services, and a center for lesbian and queer women and girls. The Ruth Ellis Institute works to improve outcomes for LGBTQ children and youth in child

welfare, juvenile justice, homelessness, and community mental health systems of care.

The Sacramento, California LGBT Center focuses on youth outreach to the 11-40% of homeless youth who identify as LGBTQ, and health outreach for HIV and suicide prevention. It also offers peer support groups for a variety of marginalized populations, community resource referrals to meet individual basic needs, education, and other services to uplift the most marginalized voices and uphold the rights and dignity of the LGBTQ community.

The San Diego Lesbian, Gay, Bisexual, and Transgender Community Center, Inc. functions as the local community's anchor organization. It provides programs and services to the full diversity of the LGBTQ community, including men, women, transgender and non-binary individuals, youth, seniors, families, LGBT Latin@ community members and their families, and those living with HIV.

The San Francisco LGBT Center connects the diverse community to opportunities, resources, and each other to achieve a stronger, healthier and more equitable world for LGBTQ people and allies. Its services meet the needs of those most marginalized and/or economically challenged, including youth, seniors, people of color, people living with HIV/AIDS, and transgender individuals.

The Source LGBT+ Center, founded in 2016, works with LGBTQ youth in rural Central California, providing spaces for LGBTQ individuals to learn, grow, belong, transform, question, and support. The Source fights for inclusive schools, families, and protections for youth in the area, offers cultural

competency training for foster placement agencies, resources families, and advocates for inclusion and safety for LGBTQ youth in schools and foster care.

The Transgender Resource Center of New Mexico provides support, community, and connection to transgender, gender-nonconforming, nonbinary, and gender-variant people and their families through advocacy, education, and direct services. Its youth program includes a support group, a children's playgroup, support for parents, and outreach to schools and Gay-Straight Alliance student clubs.

The Trevor Project is the world's largest suicide prevention and crisis intervention organization for LGBTQ young people. It works to save young lives by providing the only national, accredited, free, and confidential phone, instant message, and text messaging crisis intervention services for LGBTQ youth, along with running TrevorSpace, a safe social networking site for LGBTQ youth. Trevor also operates innovative education, research, and advocacy programs.

True Colors, Inc. of Hartford, Connecticut works to create a world where LGBTQ youth thrive and LGBTQ youth of all backgrounds feel safe, valued, and able to be their authentic selves. It provides education, advocacy, and support to LGBTQ youth, their families, communities, and those who work with them, annually training more than 5,000 people, organizing the largest LGBTQ youth conference in the country, and managing the state's only LGBTQ mentoring program.

True Colors United, a national advocacy organization, implements innovative solutions to

youth homelessness that focus on the unique experiences of LGBTQ young people. True Colors United believes in a world where all LGBTQ young people, wherever they live, are celebrated for being their authentic selves. While LGBTQ youth experience homelessness for many reasons, True Colors United knows that many become homeless due to aging out of the foster care system or family conflict over their sexual orientation or gender identity.

The William Way LGBT Community Center encourages, supports, and advocates for the well-being and acceptance of sexual and gender minorities in the Greater Philadelphia region through services and recreational, educational, and cultural programming. Its programs are intergenerational, serving youth, adults, and elders in the major areas of arts and culture, community connection, and empowerment, and offering information and referrals for adults seeking to provide a safe home for LGBT foster children.

SUMMARY OF ARGUMENT

Among the people most affected by this case are the estimated 1,000 to 1,500 LGBTQ youth in Philadelphia's foster care system. The request by Catholic Social Services ("CSS") that the Court grant it a religion-based exemption from a non-discrimination requirement applicable to all government-contracted foster care agencies also puts at risk the estimated 86,000 to 129,000 LGBTQ youth in the care of public child welfare systems nationwide. The needs of these youth confirm that the Court of Appeals and the District Court were correct in concluding that Philadelphia was justified in

enforcing its requirement prohibiting sexual orientation discrimination by agencies it hires to certify foster families for children in its care.

Beyond the compelling interest Philadelphia and all governments generally have “in ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers[,]” Pet’r’s App. 130a, requiring nondiscrimination in foster care services is consistent with and, in fact, mandated by governments’ legal obligation to ensure the wellbeing of *all* youth in their child welfare systems, without exception for LGBTQ youth. That obligation stems from the general requirement to protect the wellbeing of youth in government care, which includes a duty to ensure the equal dignity of LGBTQ youth. A ruling that would permit contracted foster care agencies to claim exemptions from nondiscrimination requirements they deem in conflict with their religious beliefs instead would breach this obligation by allowing the agencies to harm those youth in multiple ways.

First, allowing any government-funded agency performing public child welfare services to discriminate against LGBTQ people would send a government-endorsed stigmatic message to LGBTQ youth that, because of who they are, they do not deserve dignity and equal protection under the law. And those LGBTQ youth in the care of an agency that excludes same-sex couples unavoidably would receive the damaging message that the agency responsible for their welfare considers them to be unsuitable as parents and unequal as citizens. Some government-funded contract agencies, for example, require every

foster parent working with the agency to affirm that same-sex couples' marriages are invalid.³

Second, by excluding same-sex couples from eligibility as foster parents, the pool of families willing to care for LGBTQ-identified youth and able to offer them supportive care would be diminished. Both the stigmatizing and the pool-reducing harms are inconsistent with government's obligation to ensure the wellbeing of children in foster care.

Third, while the present question is whether CSS is entitled to a government contract which permits it to discriminate against prospective foster parents, a ruling allowing agencies performing a government function to opt out of generally applicable non-discrimination requirements threatens devastating direct impacts on LGBTQ youth in care, including denial of needed services and imposition of religious beliefs. Such an exemption seems likely to be taken by some contract agencies as permission to refuse entirely to serve LGBTQ children in state care. Or, if an agency provides a full scope of services such as managing the child's treatment or operating a group home, as many across the country do, some agencies might require so-called "conversion therapy" on

³ As one example, "Miracle Hill Ministries, the largest government-funded contract child placing agency in South Carolina, which serves 90% of children in the state, requires all foster parents to agree with its doctrinal statement of faith. One tenet of that doctrine is "that God's design for marriage is the legal joining of one man and one woman in a life-long covenant relationship." Order at 6, *Maddonna v. U.S. Dep't of Health & Human Servs.*, No. 19-cv-03551, (D.S.C. Aug. 10, 2020) (granting in part and denying in part Defendants' motion to dismiss). See also Miracle Hill Ministries, *Foster Care Inquiry Form*, <https://bit.ly/31vLKF0> (last visited Aug. 16, 2020).

religious grounds – practices condemned by every major social science and child welfare organization.⁴ Such an exemption would conflict directly with children’s constitutional and statutory rights to safe, professionally appropriate treatment while in care.

These harms are not incidental considerations for child welfare systems. LGBTQ youth are drastically overrepresented in foster care compared to the general population. Many enter the child welfare system for reasons related to rejection of their LGBTQ identity and experience elevated rates of depression, suicidality, and other mental and physical health challenges because of cultural stigma and prejudice. Decades of social science research confirm that discrimination, particularly in government services, causes or exacerbates these harms to LGBTQ people, including LGBTQ youth in care.

At a minimum, it is the duty of government not to inflict additional harm on the children it serves. Philadelphia has taken this duty seriously by prohibiting discrimination. Forcing Philadelphia, or any government, to permit discrimination by its contractors would cause it to violate its fundamental obligations to the children it serves. The Court of Appeals was correct to affirm the denial of CSS’s motion for a preliminary injunction and this Court should affirm.

⁴ See, e.g., Substance Abuse & Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (2015), <https://bit.ly/3aCueCZ>.

ARGUMENT**I. THE GOVERNMENT HAS A COMPELLING INTEREST AND LEGAL OBLIGATION TO PROTECT THE WELLBEING OF LGBTQ CHILDREN IN ITS CARE.****A. Philadelphia and All Governments Have a Compelling Interest in Protecting LGBTQ Youth in Care from Harm, Including Stigmatic Harm, Harm Due to Lack of Family Home Placements, and Direct Discrimination.**

Amici agree with Respondents that Philadelphia’s nondiscrimination requirement for contractors in its public child welfare system serves a compelling state interest in the least restrictive manner, and therefore survives any level of scrutiny. The Court of Appeals found that “[d]eterring discrimination [in the provision of foster care services] is a paramount public interest.” Pet’r’s App. 51a. That could not be truer for one of the most vulnerable populations in foster care, LGBTQ youth. A decision by this Court allowing contract agencies to discriminate while providing government services would significantly harm LGBTQ youth in care. Such a ruling would deprive them of equal dignity by requiring governments to allow agencies providing foster care services to brand them as “wrong” and thus inferior, limit the pool of foster and adoptive parents available to meet their needs, and invite direct discrimination against them.

1. Stigmatic Harm

A government-endorsed message that same-sex couples are not suitable parents – the result if this Court requires Philadelphia to allow foster care agencies to discriminate against same-sex couples – would demean and disserve LGBTQ youth in government care. Such a message would stigmatize them as less deserving of respect and convey that, when they grow up and consider having families of their own, their ability to be good parents and their entitlement to equal treatment in government services both will be seen as suspect.

The reality is that LGBTQ children exist – and exist in foster care systems in disproportionate numbers due to family rejection. *See* Shannan Wilber et al., *CWLA Best Practice Guidelines for Serving Youth in Out-of-Home Care* 4 (2006), <https://bit.ly/2NEheVb>. Government-endorsed condemnation of same-sex couples’ marriages stigmatizes and harms these children. Former Philadelphia Department of Human Services Commissioner Cynthia Figueroa underscored the compelling interest in preventing this harm when she testified at the preliminary injunction hearing that permitting CSS’s policy would send a “very strong signal to . . . [LGBTQ foster] youth that while we support you now, we won’t support your rights as an adult.” JA 280-81. The resulting feelings of being “wrong” and inferior are damaging to children’s development. *See, e.g.,* Michelle Birkett et al., *Does It Get Better? A Longitudinal Analysis of Psychological Distress and Victimization in Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 56 *J. Adolescent Health* 280 (2015),

<https://bit.ly/2OewBmT>. When caused by inequality imposed with government approval, the harm can rise to the level of constitutional injury. *See Heckler v. Matthews*, 465 U.S. 728, 739-40 (1984) (discrimination injures “by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy”) (citation omitted); *cf. Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding racially segregated schools denied equality due in part to stigmatic harm of negative messages sent to Black students).

The Court has recognized that the same can be true when sexual orientation bias is given official imprimatur, observing in *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015), that when “sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.” Thus, in both *Obergefell* and *U.S. v. Windsor*, 570 U.S. 744, 772 (2013), the Court condemned laws that discriminate against same-sex couples, noting how those laws not only demean the dignity of the couples but also stigmatize children.

Moreover, the Court recently reaffirmed that LGBTQ people “cannot be treated as social outcasts or as inferior in dignity and worth” in public contexts. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719, 1727 (2018). To do so would “diminish their personhood” and “work[] a grave and continuing harm.” *Obergefell*, 576 U.S. at 672, 675. Foster care agencies are free to act on their religious beliefs in various ways outside of their government contracts. Requiring the City to permit and implicitly

endorse any agency's exclusion of same-sex couples from public child welfare services, however, would not only deprive those couples of equal treatment and dignity, but would "result in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Masterpiece Cakeshop*, 138 S.Ct. at 1727. That community-wide stigma would be felt acutely by LGBTQ youth in the foster care system. Such a government-endorsed message would be inconsistent with both the constitutional dimensions of sexual orientation as "central to personal dignity and autonomy," *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)); *see also Obergefell*, 576 U.S. at 651 (the Constitution protects the rights of LGBTQ people to "define and express their identity"), and also all governments' obligation to safeguard the social and emotional wellbeing of LGBTQ youth in foster care.

2. Harm Due to Lack of Family Placements

Second, maximizing the pool of available foster parents is an interest of "the highest order" and is especially important for LGBTQ children in government care. *See* Pet'r's Br. 47. Children in foster care are removed from home, through no fault of their own, due to concerns for their safety and wellbeing. JA 79, 665-96. They come from a variety of faith traditions or no faith tradition.⁵ Children of color and

⁵ *See generally* Brief of *Amici Curiae* Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies in Support of Respondents at 33 (discussing

children with disabilities or other special needs are overrepresented in care compared to the general population. *See* U.S. Dep't of Health & Hum. Servs., Child Welfare Information Gateway, *Racial Disproportionality and Disparity in Child Welfare*, at 2 (Nov. 2016), <https://bit.ly/2Fy5dxz>. LGBTQ youth, like all youth, have multiple aspects of their identity including their sexual orientation, gender identity, and gender expression; faith tradition (or no faith tradition); race and ethnicity; cultural traditions; ability; and needs. Megan Martin et al., *Out of the Shadows: Supporting LGBTQ youth in child welfare through cross-system collaboration* (2016), <https://bit.ly/3iItqzo>. Many experience rejection or abuse on account of their identity from their own families, their community, or both. Consequently, many come into care with unique needs related to that past abuse and trauma and then must navigate a system which, far too often as explained more fully below, perpetuates the same harm, including rejection or discrimination by caregivers. U.S. Dep't of Health & Hum. Servs., Child Welfare Information Gateway, *Supporting your LGBTQ youth: A guide for foster parents* (May 2013), bit.ly/2FyukjObit.ly/2.

examples of same-sex couples from various faith traditions – Islam, Mormonism, Catholicism, Judaism, and Unitarian Universalism – turned away by government contract agencies when seeking to foster and mentor children in both state and federally administered child welfare programs, and the harm to children when they are less likely to be placed with a family who will raise them consistent with their religious beliefs). *See also* *Rogers v. U.S. Dep't of Health & Hum. Servs.*, No. 19-cv-01567-TMC, __ F.Supp.3d __, 2020 WL 4743162, *4 (D.S.C. May 8, 2020); *Marouf v. Azar*, 391 F.Supp.3d 23, *34 (D.D.C. June 12, 2019).

This reality underscores why Philadelphia is correct to recognize that it must address the needs of LGBTQ youth in its foster care system, which means finding an adequate supply of families willing to care for these youth in an affirming and supportive manner. Excluding same-sex couples from fostering is counterproductive because the LGBTQ community is more likely to welcome and accept LGBTQ youth, and at least some LGBTQ children will be best served by placements with members of the LGBTQ community, including those from an array of faith traditions (and none will be well served by a foster family that criticizes and rejects them for who they are). Discriminatory exclusion of same-sex couples therefore harms and deters qualified prospective parents from participating in the system.⁶ Even more destructively, it comes at the expense of the many children who need foster homes and particularly LGBTQ children for whom affirming and supportive homes are especially needed due to these children's prevalence in care.

3. Direct Discrimination

Another egregious outcome for LGBTQ youth – direct discrimination against them by contract providers – is not presented by the facts of this case, but is a predictable outcome if the Court accepts Petitioners' claim that the Constitution entitles government-contracted foster care providers to opt out of nondiscrimination requirements they deem to be in conflict with their faith. Governments have an obvious

⁶ See the discussion of this issue in the brief of *Amici Curiae* Family Equality and National PFLAG in Support of Respondents.

compelling interest in ensuring LGBTQ youth in their care are protected from direct discrimination and harm, including denial of life-saving services or imposition of others' religious beliefs. LGBTQ children's rights, both constitutional as described above, and statutory as described more fully below, would be squarely implicated if the Court were to accept Petitioners' position and, thus, permit agencies to decide, based on their religious beliefs, which youth to serve, what services to provide them, and whether to impose "treatment" that demeans or disparages them. Respondents accurately described this compelling government interest as "preventing contractors from acting on a government's behalf from violating individuals' constitutional rights." *See* Resp'ts' Br. 47. This is beyond dispute because the right and need of children in care, including LGBTQ children, to physical and emotional safety and wellbeing are the guiding principles of the child welfare system.

Accordingly, harms to LGBTQ youth – both dignitary and substantive – implicate a wide range of constitutional and statutory rights of these young people. If governments authorize discrimination by contract agencies, which would likely result in these harms, it would violate their obligation to ensure the wellbeing, dignity, and security of all children in care.

As a constitutional matter, all youth in state custody, including LGBTQ youth, are guaranteed:

- rights to personal security, *see, e.g., Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regul. Servs.*, 380 F.3d 872, 880 (5th Cir. 2004) (substantive due process right of foster

children “to personal security and reasonably safe living conditions”);

- freedom from psychological harm, *see, e.g., Marisol A. by Forbes v. Giuliani*, 929 F.Supp. 662, 675 (S.D.N.Y. 1996) *aff’d*, 126 F.3d 372 (2d Cir. 1997) (children in foster care have a “substantive due process right to be free from unreasonable and unnecessary intrusions into their emotional well-being”);
- freedom from physical and psychological deterioration, *see, e.g., K.H. through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990);
- adequate care, including the provision of services, *see, e.g., Youngberg v. Romeo*, 457 U.S. 307, 315, 317 (1982); and
- a reasonably suitable placement, *see, e.g., Johnson v. Collins*, 58 F.Supp.2d 890, 904 (N.D. Ill. 1999) (recognizing “a clearly established substantive due process right to suitable foster care placement, which includes the right to adequate supervision and physical safety”), *vacated on other grounds*, 5 F.App’x 479 (7th Cir. 2001).

Just like direct discrimination, a damaging message sent to LGBTQ youth when government contractors brand LGBTQ people as unacceptable parents causes psychological harm to these youth, intruding into their emotional wellbeing and

damaging their physical and mental health. Moreover, given the perennial shortages of quality foster families, diminishing the pool of families willing and able to support LGBTQ youth would deprive at least many of them of their rights to personal security, stability and safety in suitable foster placements.

B. Federal and State Law Reflect Government's Compelling Interest in Protecting LGBTQ Children in Care and Obligate Government to Provide that Protection.

Federal and state statutes confirm government's compelling interest in protecting all children in care from harm, including LGBTQ children, and obligate it to ensure their wellbeing. At the federal level, the Adoption and Safe Families Act of 1997 requires child welfare systems to provide safety, permanency, and wellbeing for all youth in the government's custody. *See* Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 671(a)(15)). Titles IV-E and IV-B of the Social Security Act require states receiving federal child welfare funding to place children in a "safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child[.]" 42 U.S.C. § 675(5)(a). States receiving federal funds must also maintain standards for placements that are "reasonably in accord with recommended standards of national organizations concerned with standards for the institutions or homes, including standards related to admissions policies, safety, sanitation, and protection of civil rights[.]" 42 U.S.C. § 671(a)(10). Further, states receiving funds under the Foster Care

Independence Act are required to “use objective criteria . . . for ensuring fair and equitable treatment of benefit recipients.” Pub. L. No. 106-169, 113 Stat. 1822 (1999) (codified at 42 U.S.C. § 677).

The U.S. Department of Health and Human Services, Administration for Children and Families (“ACF”), which sets federal child welfare policy nationally, has recognized that a general duty to promote the wellbeing of youth in care includes providing for “[i]dentity development, self-concept, self-esteem, [and] self-efficacy[.]” U.S. Dep’t of Health & Hum. Servs., Admin. on Children, Youth, & Families, *Information Memorandum* ACYF-CB-IM-12-04 (2012), <https://bit.ly/2OfUjiC>. For LGBTQ youth specifically, ACF confirmed for state and tribal child welfare systems that all children in their care are “entitled to a safe, loving and affirming foster care placement, irrespective of the young person’s sexual orientation, gender identity or gender expression.” U.S. Dep’t of Health & Hum. Servs., Admin. on Children, Youth, & Families, *Information Memorandum* ACYF-CB-IM-11-03 (May 2016), <https://bit.ly/2PZV7aH>.

The same principles in federal child welfare law and policy are embodied in state child welfare law, such as Pennsylvania’s, establishing that children in foster care have the right to “[t]reatment with fairness, dignity, and respect[;]” to freedom from discrimination, harassment, and abuse; to live in a safe, healthy, comfortable setting that best meets the child’s needs; to have their cultural and religious backgrounds and preferences respected and accommodated; and, most fundamentally, to safety, stability, permanence, and wellbeing. *See* 11 Pa. Stat.

and Cons. Stat. Ann. § 2633. Child welfare professional standards set this same priority commitment to children’s individual wellbeing as a requirement nationwide.⁷

This commitment is critical because every child in foster care has unique needs. Limiting the pool of prospective parents to those who meet a private agency’s religious criteria necessarily fails to prioritize finding the “most appropriate setting” for each child. Categorically rejecting same-sex couples reduces the number of appropriate family homes available for placement of any children and has particular impact on LGBTQ youth, who tend to experience elevated placement instability.⁸ Fewer

⁷ See Br. of Voice for Adoption et al., as *Amici Curiae* in Support of Respondents (national child welfare organizations explaining that discrimination against prospective foster families headed by same-sex couples is detrimental to children’s best interests); Child Welfare League of Am. et al., *Recommended Practices to Promote the Safety and Well-Being of LGBTQ Youth and Youth at Risk of or Living with HIV in Child Welfare Settings* (2012), <https://bit.ly/349KOJo>.

⁸ See Br. of Prospective Foster Parents Subjected to Religiously Motivated Discrimination by Child-Placement Agencies as *Amici Curiae* (couples who were turned away because of their religion, sexual orientation or both when seeking to foster); Br. of Family Equality and National PFLAG (couples who were turned away from fostering or adopting because of their sexual orientation, sometimes resulting in a child never finding an adoptive family); Br. of *Amici Curiae* FosterClub and Former Foster Youth (former foster youth, including LGBTQ youth, who aged out of foster care due to lack of available families); Br. of *Amici Curiae* Scholars Who Study the LBG Population (same-sex couples are more likely to foster and adopt than their heterosexual counterparts and discriminating against them could reduce the number of homes for children).

placement options means increased likelihood of children languishing in congregate care, hardly an approach that prioritizes their needs. Moreover, turning away same-sex couples also injures the dignity of already vulnerable LGBTQ youth through unequal treatment under the law. Thus, the use of religious criteria (as opposed to criteria related to ability to care for a child) in screening potential parents not only violates federal and, in this case, Pennsylvania law, but also violates the City Department of Human Services' professional obligation to provide settings that fit the needs of LGBTQ children.

II. STIGMA AND DISCRIMINATION DRIVE LGBTQ YOUTH INTO CHILD WELFARE SYSTEMS IN DISPROPORTIONATE NUMBERS, WHERE THEY FACE FURTHER DISPARATE TREATMENT AND OUTCOMES.

The discrimination and stigma that would increase from requiring governments to permit exclusionary foster care policies already cause the involvement of countless LGBTQ youth in the foster care system – a system in which they often face disparate treatment and harsher outcomes due to more of the same mistreatment.⁹

It is well established that LGBTQ youth are over-represented in the child welfare system compared to their non-LGBTQ peers. A recent, federally funded study by the University of California of children in the

⁹ See Br. of FosterClub (LGBTQ former foster youth who experienced mistreatment and discrimination while in foster care).

Los Angeles County system found that 19.1 percent of youth surveyed identified as LGBTQ, suggesting that “there are between 1.5 and 2 times as many LGBTQ youth living in foster care as LGBTQ youth estimated to be living outside foster care.” Bianca Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles* 6 (2014), <https://bit.ly/3auWk3g>. Other studies have found even higher rates of overrepresentation: although LGBTQ youth make up only about 5 to 7 percent of the general youth population, research estimates that 25 percent of youth in child welfare systems are LGBTQ. See Christina Wilson Remlin et al., *Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care* (April 2017), <https://bit.ly/2xAXIVa>. A recent survey of youth across California found that 30.4 percent of youth living in foster care identify as LGBTQ, as compared to 11.2 percent of youth who so identify in a national representative sample of all youth. Laura Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 143 *Pediatrics* 3 (March 2019), <https://bit.ly/3kW8Ihl>. According to Philadelphia, there are currently 5,000 children in the protective custody of its Department of Human Services. Resp’ts’ Br. 1. Applying the estimates from the research cited above regarding the percentage of foster youth who identify as LGBTQ yields approximately 1,000 to 1,500 of Philadelphia foster children are LGBTQ, and an estimated 86,000 to 129,000 in care nationwide.

Family rejection of a young person’s LGBTQ identity frequently leads this population into the child welfare system. Shannan Wilber, *supra* at 4. In one

study of youth in out-of-care home settings, 42 percent of LGBTQ respondents had been either removed or ejected from their homes over conflict related to their sexual orientation or gender identity. *Id.* (citing Caitlin Ryan & Rafael Diaz, *Family Responses as a Source of Risk & Resiliency for LGBT Youth*, Paper Presented at the Child Welfare League of America Preconference Institute (Feb. 2005)). This stigmatic experience means that many LGBTQ youth who enter the system have “the added layer of trauma that comes with being rejected or mistreated because of their sexual orientation, gender identity or gender expression.” Human Rights Campaign, *LGBTQ Youth in the Foster Care System*, <https://bit.ly/2NLKJES> (last visited Aug. 16, 2020).

Once in care, LGBTQ youth are also more likely to report negative outcomes and experiences than non-LGBTQ youth. A survey conducted by researchers at the University of California found that LGBTQ youth are more likely to report mistreatment in out-of-home care: 37.7 percent of LGBTQ youth reported that they had experienced poor treatment due to their gender expression, sexual orientation, or transgender status. Wilson, *supra*, at 35. Additionally, LGBTQ youth have a higher than average number of foster placements and are more likely to be living in a group home as opposed to a family home. *Id.* Child welfare professionals agree that children in family homes have “consistently better experiences and less problems” than youth in group home settings. Dongdong Li et al., *Comparing Long-Term Placement Outcomes of Residential and Family Foster care: A Meta-Analysis*, 20 *Trauma, Violence, & Abuse* 5, 653 (2017), <https://bit.ly/2OdDa9q>. Finally, LGBTQ youth are more likely to “age out” of child welfare systems

without achieving permanency through either returning to families of origin or a legal guardianship or adoption secured through the child welfare system. Martin et al., *supra*, at 25.

Discrimination and stigma influence these disparate outcomes for LGBTQ youth, increasing barriers to permanency such as being deemed “unadoptable” because of their sexual orientation or gender identity, and being blamed for harassment and abuse from others. Wilson, *supra*, at 11 (citing Wilber, *supra*). These disparities lead to life-long negative outcomes for system-involved LGBTQ youth, such as elevated rates of homelessness. Wilson, *supra*, at 38. For example, a study of youth in out-of-home care in New York City found that 78 percent of LGBTQ youth experiencing homelessness either had been removed or had run away from foster homes because of abuse or discrimination; 56 percent chose to live on the street rather than in a foster placement because they felt safer there. Remlin, *supra*, at 3 (citing Wilber, *supra*, at 5-6).

Given the prevalence of trauma LGBTQ youth experience both prior to and in the foster care system, permitting officially sanctioned discrimination against LGBTQ people within that system would only compound the harm these youth must endure. Allowing agencies to turn away the class of families headed by same-sex couples both would reduce overall available homes and also would reduce homes more likely to offer supportive environments to LGBTQ youth. Doing so would put those youth at greater risk of continuing instability and distress, and perpetuate the humiliation and degradation of having been deemed inferior due to their LGBTQ status. A

religious exemption thus may permit contract agencies to harm these youth by refusing to serve them, support them, and meet their needs – resulting in trauma by the very entities legally charged with protecting them. Ordering Philadelphia to partner in discrimination against same-sex couples or LGBTQ youth themselves would heap more harm upon them.

III. THE STIGMA AND DISTRESS RESULTING FROM DISCRIMINATION HARMS THE HEALTH AND SECURITY OF LGBTQ YOUTH IN CARE.

A. Rejection, Discrimination, and Stigma Cause LGBTQ Youth to Experience Higher Rates of Mental and Physical Health Challenges.

Societal stigma and discrimination traumatize LGBTQ youth, causing significant health consequences. Compared with their non-LGBTQ peers, LGBTQ youth report much higher rates of mood disorders, depression, anxiety, alcohol and drug use, and lower self-esteem. See Human Rights Campaign, *2018 LGBTQ Youth Report* (2018), <https://bit.ly/2IfS4X8> (citing Birkett, *supra*). A 2011 meta-analysis found that, on average, 28 percent of LGB young people reported a history of suicidality, compared with only 12 percent of heterosexual youth. Michael Marshal et al., *Suicidality and Depression Disparities Between Sexual Minority and Heterosexual Youth: A Meta-Analytic Review*, 49 *J. of Adolescent Health* 115, 119 (2011), <https://bit.ly/2NBcXC5>. Transgender youth are at even greater risk. According to the largest national

study, 40 percent of transgender adults report having attempted suicide, with 92 percent of them reporting that their attempt occurred before age 25. Sandy James et al., *The Report of the 2015 U.S. Transgender Survey* 114-115 (2016), <https://bit.ly/2NEMXWx>.

Research strongly suggests that health disparities and negative health outcomes for LGBTQ youth are the result of stigma, discrimination, and victimization due to their identity. *See, e.g.*, Birkett et al., *supra*, 6 (LGBTQ youth who experienced higher rates of victimization and less social support reported greater depressive symptoms). In addition to negative health outcomes, anti-LGBTQ stigma also is associated with risky behavior and poor academic performance for LGBTQ youth. *See* HRC *2018 LGBTQ Youth Report, supra*; *see also* Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 *Pediatrics* 346, 346 (2009). In contrast, LGBTQ youth who report that “being out [about their LGBTQ identity] was a positive and affirming experience for them also report better outcomes in terms of their overall health and well-being.” HRC *2018 LGBTQ Youth Report, supra*, at 16 (citing Stephen Russell & Jessica Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 *Ann. Rev. Clin. Psychol.* 465 (2016), <https://bit.ly/2Dui0R>).

Rejection by families or caregivers causes particular harm to the mental health of sexual minority youth. The Family Acceptance Project, based at San Francisco State University, has found that LGB young adults reporting higher levels of family rejection during adolescence “were 8.4 times more likely to have attempted suicide, 5.9 times more likely

to report high levels of depression, 3.4 times more likely to report illegal drug use, and 3.4 times more likely to have engaged in unprotected sexual intercourse” compared with their LGB peers who reported no or low levels of family rejection. Ryan, *Family Rejection, supra*, at 349-50. The Project explains that “adverse, punitive, and traumatic reactions to a child’s LGB identity” often has a negative influence on their “risk behaviors and health status[.]” *Id.* at 350. Conversely, LGBTQ young people whose families are affirming have greater self-esteem and resilience and are at a lower risk of negative health outcomes such as depression, hopelessness, and substance abuse. *Id. See also* HRC 2018 LGBTQ Youth Report, at 4 (citing Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. of Child & Adolescent Psychiatric Nursing 4, 205 (2010)), <https://bit.ly/2N2vke1>.

Further, the legal status of LGBTQ people affects the health of LGBTQ young people. When anti-LGBTQ messaging is endorsed by government action or legislation, it is associated with negative mental health outcomes for LGBTQ youth. The Association of Medical School Pediatric Department Chairs recently expressed concern that legislation permitting government-funded foster and adoption agencies to refuse to serve same-sex couples negatively impacts LGBTQ young people. Daniel Shumer et al., *The Effect of Lesbian, Gay, Bisexual, and Transgender-Related Legislation on Children*, 178 J. of Pediatrics 5 (2016), <https://bit.ly/2Oc0STo>. Similarly, *Amicus* Trevor Project, which provides crisis intervention and suicide prevention services to LGBTQ young people, reported that their hotline received record numbers of calls after President Trump announced two anti-

transgender policies: in the 24 hours after the transgender military ban was announced, the number of transgender callers more than doubled, and after the administration withdrew guidance regarding Title IX's protections for transgender students, the hotline saw a 35 percent increase in calls. Samantha Manzella, *According to the Trevor Project, Number of Trans Callers in Crisis Doubled After Trump's Military Tweets*, NewNowNext (Aug. 4, 2017), <https://logo.to/2Ij7U3l>; Avalon Zoppo, *Transgender Hotline Reports Flood of Calls After Trump Walks Back Federal Protections*, NBC News (Feb. 26, 2017), <https://nbcnews.to/2QaTNjf>.

B. Discrimination and Stigma Against LGBTQ People Have Lifelong Negative Effects on Mental and Physical Health.

While the number of studies specific to the impact of discrimination and stigma on LGBTQ youth is limited, extensive research on LGBTQ adults finds that discrimination and stigma harm individual wellbeing, particularly when endorsed by the law. For example, living in a state either without protections against anti-LGBTQ discrimination or that affirmatively passes anti-LGBTQ legislation is associated with higher levels of psychological disorders and distress among LGBTQ people. See Mark Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in LGB Populations*, 99 Am. J. of Pub. Health 2275 (2009), <https://bit.ly/2DzcmMN>; Sharon Rotosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. of Counseling Psychol. 56 (2009), <https://bit.ly/2R1g2JK>.

Similarly, a recent study by public health researchers investigated the impact of laws permitting denial of services to same-sex couples, such as Michigan's law that permitted religious child-placing agencies to discriminate against same-sex couples, substantially the same issue as in this case. The study found that these laws were associated with a "46% relative increase in the proportion of sexual minority adults reporting mental distress." Julia Raifman et al., *Association of State Laws Permitting Denial of Services to Same-Sex Couples with Mental Distress in Sexual Minority Adults: A Difference-in-Difference-in-Differences Analysis*, 75 JAMA Psychiatry 671, 674 (2018), <https://bit.ly/2J8fkKm>.

In contrast, government action to protect LGBTQ individuals from "prejudice, discrimination, and violence would help to reduce the occurrence of prejudice-related stressors[,] particularly passing laws which "respect gay men and lesbians' intimate relationships by providing them . . . the benefits afforded to heterosexual married people and their families." Ilan Meyer & David Frost, *Minority Stress and the Health of Sexual Minorities*, in *Handbook of Psychology and Sexual Orientation* 252, 259 (Charlotte Patterson & Anthony D'Augelli eds., 2013), <https://bit.ly/2OdulfO>.

Importantly, the study analyzing discriminatory state laws like Michigan's demonstrates that harm to the mental health of LGBTQ individuals flows not only from being denied services, but also from either hostility in the public discourse or the message sent when government endorses unequal treatment. Raifman, *supra*, at 675 (increases in mental distress after law's passage may stem from "mechanisms with

an immediate impact, such as media coverage and the awareness of unequal rights, rather than slower mechanisms, such as direct exposure to service denial”). Similarly, research has found that LGBT people who have recently experienced discrimination are more likely to hide their identities to avoid future mistreatment. *See* Sejal Singh & Laura Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, Ctr. for Am. Progress (May 2, 2017), <https://ampr.gs/2oTvayl>.

General anti-LGBTQ cultural stigma is a stressor that causes negative health conditions, such as mental disorders, psychological distress, physical disorders, detrimental behaviors such as smoking or lack of condom use, and a general undermining of well-being. *See* Meyer & Frost, *supra*, at 252. The “minority stress model” posits that “because of stigma, prejudice, and discrimination, lesbian, gay, and bisexual people experience more stress than do heterosexuals and that this stress can lead to mental and physical disorders.” *Id.*; *see also* Ilan Meyer, *Minority Stress and Mental Health in Gay Men*, 36 *J. of Health and Soc. Behav.* 38 (1995), <https://bit.ly/2OPtkHL>. Applied to young people, the minority stress model explains that rejection and stigma drive the higher rates of suicidality and depression in LGBTQ youth. Marshal, *supra*, at 116; *see* Meyer & Frost, *supra*, at 255 (“Higher rates of suicide attempts among members of sexual minorities are related to minority stress encountered by youth due to coming out conflict with family and community[.]”).

Research on minority stress makes clear that, in order to fulfill their obligation to provide for the best interests and wellbeing of LGBTQ youth, Philadelphia and other governments cannot allow contracted foster care agencies to discriminate against same-sex couples or LGBTQ children. Doing so would endorse stigma and rejection of these people, driving negative health outcomes such as depression and suicidality, rather than facilitating the wellbeing of these young people for whom the government is responsible.

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be affirmed.

Respectfully submitted,

Jennifer C. Pizer

Counsel of Record

M. Currey Cook

LAMBDA LEGAL DEFENSE AND

EDUCATION FUND, INC.

August 20, 2020

Counsel for Amici Curiae